

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 429 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?  
Nos.1 & 3 to 5 No.No.2 Yes.

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BHARVAD CHHOTA BHAGA

Versus

BHARVAD JAGA DAHYA

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Appearance:

MR PM THAKKAR for Petitioner

MR SURESH M SHAH for Respondent No. 1

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 21 /04/98

ORAL JUDGEMENT

This is defendant's Second Appeal.

The facts giving rise to this Appeal are that the plaintiff, who is the owner of the disputed premises permitted the defendant-appellant to occupy one room and kitchen as licensee for short period of two months without charging any licence fee. This was done at the

intervention of the common relative Gandabhai Chakubhai. The defendant did not vacate the premises after expiry of two months. Hence, the notice was served upon him. He again did not comply with the notice rather gave wrong reply to the notice that he was tenant on monthly rent of Rs.7/- and accordingly after revocation of licence the suit for possession was filed against the defendant-appellant.

The defendant-appellant contested the suit on the ground that he was tenant in the accommodation consisting of one room, osari, kitchen, common lavatory, water tap and the compound on Rs.7/- p.m. It was initially in the tenancy of one Hemubhai Kalaji. It was denied that the appellant was licensee or that he was inducted as licensee through intervention of one Gandabhai. It was also pleaded that the Appellant was paying the rent but no receipt was issued by the landlord-respondent. He filed application in the Trial Court for fixation of standard rent.

The Trial Court fixed the standard rent at Rs.7/p.m. It however, found that the defendant-appellant was licensee and not tenant and since his licence was revoked he was liable to vacate the premises. Accordingly the suit was decreed.

An Appeal was preferred. The lower Appellate Court concurred with the findings of the Trial Court that the defendant-appellant was licensee and not tenant of the plaintiff-respondent. It also found that licence was revoked and decree for possession was rightly passed. The Appellate Court however modified the judgment of the Trial Court regarding fixation of standard rent observing that since the relationship of landlord and tenant was not established between the parties the standard rent could not be fixed. It is, therefore, this Second Appeal.

This Court while admitting this Appeal did not formulate any question of law of its own rather mentioned that the questions of law arise as formulated in the memo of Appeal. As many as ten substantial questions of law had been formulated in the memo of Appeal. I further feel that questions no. 1 to 9 are mere repetition and only two substantial questions arise for determination in this Second Appeal.

The first is whether the Courts below had jurisdiction to decide the suit of this nature and the second is whether the relationship between the parties

was that of licensor and licensee or landlord and tenant.

The learned Counsel for the parties were heard at length and the judgments of the two Courts below were perused and the record was examined.

The learned Counsel for the Appellant contended that the Trial Court had no jurisdiction to decide the suit of this nature especially when the defendant-appellant pleaded that he was tenant of the accommodation on monthly rent of Rs.7/- and denied that he was licensee of the plaintiff. According to the learned Counsel for the Appellant since a bonafide question about Appellant's tenancy was raised which required adjudication the Trial Court should have returned the plaint for presentation to proper Court and it was not necessary for the Appellant to establish by cogent evidence before the Civil Court that he was tenant and such question should be decided only by the rent Court and not by the Civil Court. Learned Counsel for the respondent on the other hand contended that the plea of want of jurisdiction was neither raised in the Trial Court nor any issue was raised before the Trial Court nor it was raised before the First Appellate Court hence it cannot be agitated in the Second Appeal. I am unable to accept this contention. The plea of lack of jurisdiction can be raised at any time even in Second Appeal so also on the execution side. Since I have heard the learned Counsel for the parties on the plea of jurisdiction it is proposed to answer this question.

From the pleadings of the parties, it is clear that the plaintiff filed the suit against the defendant-appellant for possession on the ground that the defendant was licensee for a short period and no licence fee was charged from him and his licence was revoked through notice. The case of the defendant-appellant was that he was tenant of plaintiff on Rs.7/- p.m. and not that he was licensee. The question is whether in a suit of such nature the jurisdiction of the Civil Court could be ousted by mere pleading of the defendant-appellant that he was tenant. It is well settled law that jurisdiction of the Court is to be determined on the basis of allegations made in the plaint. The pith and substance of the plaint allegations have to be kept in mind so also pith and substance of the relief sought. It is the choice of the plaintiff to choose his Forum. It is another thing that the plaintiff fails to establish his case before such Forum. However, the jurisdiction of the Forum or Court of the choice of the plaintiff cannot be ousted by the defendant-appellant merely by pleading

that he is tenant of the plaintiff-respondent. If the plaintiff claims that the defendant was his licensee, then suit for possession from licensee after revocation of licence will lie only in the Civil Court. If the plaintiff fails to establish the allegation of licence and its revocation naturally he will be out of Court and the suit is bound to fail. However, the plaintiff cannot be compelled for trial of such question to approach rent Court merely on the allegation of the defendant in the written statement. May be that the allegation of the defendant may be bonafide but if the plaintiff fails to establish his case he may be out of Court and Civil Court in that event will not be called upon to decide whether the defendant is tenant of the plaintiff or not. Ofcourse if the plaintiff seeks amendment of the plaint and prays for returning the plaint for presentation to proper Court then only such option could be exercised by the Trial Court and not otherwise. Mere raising bonafide dispute about the relationship of landlord and tenant is not enough to oust the jurisdiction of the Civil Court.

Analogy can be taken to elucidate the point. A suit for eviction or for possession under the general law can be filed only in Civil Court. If such suit is in respect of open land the suit for possession will always lie in the Civil Court. If the suit is in respect of accommodation viz. building where no relationship of landlord tenant is alleged the suit will lie in the Civil Court. If some unauthorised person committed trespass in the building owned by the plaintiff he can file suit for possession against such trespasser in the Civil Court. If however, relationship of landlord and tenant between the parties is admitted and the disputed property is building and the relief sought is possession by eviction of the tenant and for recovery of rent such suit will be triable by the rent Court within the meaning of Section 28 of the Bombay Rent Act, 1947. A suit against the trespasser cannot be filed in rent Court eventhough the trespasser alleges to be the tenant. On similar facts the Division Bench of this Court in case of M/s.Nanikram Sobhraj Mills (Pvt.) Ltd. Vs. Kirtidev reported in 20 GLR Pg.469, held that section 28(1) of Bombay Rents, Hotel & Lodging House Rates Control Act, will not apply to the suit filed against the defendant as a trespasser eventhough the defendant claimed that he was tenant of the land. It was held that expression any suit or proceeding between landlord and tenant relating to recovery of rent or possession of any premises to which any of the provisions of this part apply in section 28(1) of the Bombay Rent Control Act would cover the premises let out, and cannot cover within its sweep the premises

which are not let out but are trespassed upon by the defendant. It was further laid down that three conditions have to be satisfied before the bar under section 28(1) becomes applicable. First is that the suit or proceeding must be between landlord and tenant. Second is that the suit or proceeding must be one relating to rent or possession and thirdly, such recovery of rent or possession claimed in the suit or proceeding must be in respect of premises to which any of the provisions of part II of the Act apply.

The said principle can be applied to the instant case where the plaintiff filed suit against the licensee for possession after revoking licence. Simply because the appellant alleged himself to be the tenant the jurisdiction of the Civil Court could not be barred. I am therefore, unable to accept the contention of learned Counsel for the Appellant that the jurisdiction of the Civil Court is barred. This question is therefore answered in negative.

The next substantial question is whether the plaintiff succeeded in establishing that licence was granted by him to the defendant. The initial burden lies upon the plaintiff to prove this fact. Both the Courts below have considered oral and documentary evidence on record and also the circumstances of the case and found that the plaintiff succeeded in establishing that licence was granted to the defendant. Learned Counsel for the Appellant vehemently assailed the judgment of the Trial Court and pointed out certain absurd inferences drawn by the Trial Court. However, that will not render the judgment of the lower Appellate Court defective. The lower Appellate Court has discussed the entire evidence on record in its own way and no such inference has been drawn as was done by the Trial Court.

It was admitted in the course of arguments that it is a case of oral evidence of the parties. There is no documentary evidence to establish theory of licence or theory of tenancy. However, since both the parties have entered in evidence, the evidence has to be scrutinized and weighed. The findings can be given after assessment of such evidence.

Since the lower Appellate Court has properly appreciated the evidence on record there is little scope for interference in Second Appeal. The finding of fact recorded by the lower Appellate Court cannot be interfered by the High Court in Second Appeal by reappreciating the evidence substituting its own findings

of fact. Since the question whether the relationship of licensor or licensee existed between the parties or not is a question of fact hence finding on such factual question cannot be disturbed in Second Appeal especially when the findings of the two Courts below on this point are concurrent. Ignoring the improbable and absurd inferences drawn by the Trial Court it can be said that there was no misinterpretation of evidence by the lower Appellate Court.

I have given my thoughtful consideration to the material on record. It is admitted case of the parties that neither any rent note was prepared nor any lease deed was executed. Likewise no document granting licence ever came into existence. The plaintiff relied upon the oral evidence and notice issued by him. The plaintiff also examined one witness Gandabhai who was present at the time of creation of licence. Gandabhai is common relation of the parties. His evidence could not be disbelieved merely on the ground of relationship. In such case if the plaintiff received corroboration from Gandabhai he could be believed by the lower Appellate Court. Notice also contains the allegation of licence. No doubt the notice was replied pleading that it was a case of tenancy and not licence but there is no satisfactory evidence to show that actually tenancy was granted by the plaintiff-respondent. Several cases have been cited in the judgment of the lower Appellate Court. In order to determine the relationship between the parties, intention of the parties is to be seen when there is any document executed between them. Since no document either in the shape of lease-deed or in the shape of licence deed was executed the intention cannot be gathered as was done in the two cases referred in the judgment of the lower Appellate Court. However, from the evidence on record it has to be seen whether the plaintiff succeeded in establishing his case or not. Since the plaintiffs oral evidence found corroboration from the oral evidence of Gandabhai it could be believed. He could not get better evidence. It is the case of the plaintiff that he did not charge any licence fee or rent. Consequently he could not produce receipt showing payment of licence fee. On the other hand the case of the plaintiff-respondent was that he did not charge any licence fee. So in the circumstances of the case no better evidence could be adduced by the plaintiff-respondent.

The defendant-appellant alleged the case of tenancy in order to demolish the case of the plaintiff. However, the defendant has not adduced any reliable

evidence except his own statement. Learned Counsel for the Appellant vehemently argued that the defendant tendered rent for four months amounting to Rs.28/- which was not accepted by the plaintiff. It was thus urged that the act of the defendant shows that the plaintiff refused to accept the rent. Thereafter it was sent by Money Order which too was refused and it gives strength to the defendant's case of his tenancy. I am however, unable to agree with this contention. The said Money Order coupon or postal receipt was not filed in the Trial Court. Money Order coupon if filed would have shown whether it was refused or it was returned for some other reason. Mere statement of the defendant about refusal of Money Order especially when the coupon is in his possession could not be safely relied upon. Moreover, there is no explanation why the rent was paid to the plaintiff without obtaining receipt. No single rent receipt has been filed. It is difficult to believe that tenant would go on paying rent without obtaining any receipt. Reply notice by itself is not conclusive evidence. On the other hand it simply shows the stand of the defendant which has to be corroborated by some reliable evidence. Since except the statement of the defendant which is highly interested version there is no reliable oral or documentary evidence, the lower Appellate Court committed no illegality in prima facie repelling the case of the defendant-appellant about his tenancy.

Since from the oral evidence it is clearly established that the plaintiff granted licence for short period to his relation, the defendant-appellant not much scope is there for determining the intention of the parties. The Division Bench verdict of this Court in the case of Virji Lavji Makwana Vs. Rainbow Screen Shades reported in 20 GLR Pg.352 is therefore of little help to the Appellant. On the other hand this case supports the case of the plaintiff-respondent. In para 5 of the judgment it was observed that genuine relationship of licensor and licensee can conceivably arise in the following circumstances :

- [1] A property owner may have an occasion to oblige a relation or friend in need of accommodation and in view of the special relationship may grant the premises for temporary use without intending to create a lease so that the premises not needed by him at the moment may not remain idle whilst his needy friend or relative suffers avoidable hardship;

[2] An owner of property may suddenly have an occasion to go to some other place for a temporary period and instead of allowing the premises to remain idle he permits some one in whom he has trust to occupy the same to meet the temporary need of the latter which may coincide with his own temporary period of absence;

[3] A property owner may accept some one as a paying guest while he himself retains possession of the property as the principal occupant.

[4] In such cases even if some occupation fees are charged it would not matter as in essence the relationship of licensor and licensee can be spelled out in view of the backdrop.

The case under consideration to my mind falls under first illustration given in para 5 at page 154 of this judgment. Thus, this case to my mind lends support to the case of the plaintiff-respondent.

There is no contradiction in the plaint, in the notice and in the statement of the plaintiff regarding short period of 2 to 3 months for which licence was granted. Hence the plaintiff-respondent could not be disbelieved. In the result, I find that the findings recorded by the two Courts below on the second substantial question are correct and require no interference in this Appeal. The lower Appellate Court has rightly modified the judgment and decree of the Trial Court fixing the standard rent. If the relationship of landlord and tenant between the parties does not exist rather it was a case of licensor and licensee the Trial Court had no jurisdiction to fix the standard rent of the accommodation.

In the result, I do not find any merit in this Appeal which is dismissed with costs.

Sd/-

(D.C.Srivastava, J)

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m.m.bhatt